Supreme Court, U.S.
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NO. 95-138

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

AMY FRIEDMAN,

Petitioner,

v.

FIDELITY BROKERAGE SERVICES, INC., *et al.*,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred when it concluded that a New York levy statute that provides a complete defense for garnishees who have honored a levy protects Respondents from a claim of conversion for honoring levies issued by New York State tax authorities pursuant to New York law and served in New York.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Supreme Court Rule 29.1, the following identifies the parent company of Respondents and all non-wholly owned subsidiaries:

FMR Corporation, with its divisions and subsidiaries, does business under the trade name "Fidelity Investments." Fidelity Service Company (incorrectly identified by Petitioner as Respondent Fidelity Service Corporation) is a division of FMR Corporation. The other two named Respondents, Fidelity Brokerage Services, Inc. and National Financial Services Corporation, are direct or indirect subsidiaries of FMR Corporation.

There are no direct or indirect subsidiaries of FMR Corporation that are not wholly owned.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE PETITION . . . 5

I. THE COURT OF APPEALS DECISION IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND OTHER COURTS 5

A. New York Law Governs The Validity And Effect Of The Tax Compliance Levies 7

B. New York's Levy Discharge Statutes Insulate Respondents As A Matter Of Law Against Liability For Having Honored The Levies 9

CONCLUSION 22

TABLE OF AUTHORITIES

CASES — Page

Bolling v. Samples, 117 Ga. App. 38, 159 S.E.2d 727 (Ga. App. 1967) 20

Brezenoff v. Franklin Savings Bank, 108 Misc. 2d 626, 438 N.Y.S.2d 171 (Civ. Ct. 1981) 14

Burroughs v. Wallingford, 780 F.2d 502 (5th Cir. 1986) 20

Commonwealth of Kentucky v. Laurel County, 805 F.2d 628 (6th Cir. 1986), *cert. denied*, 484 U.S. 817 (1987) 19-20

Determan v. Jenkins, 111 F. Supp. 604 (N.D. Ga. 1953) 20

DiEdwardo v. First National Bank of Bath, 442 F. Supp. 499 (E.D. Pa. 1977) 20

Dumpson v. Empire City Savings Bank, 44 Misc. 2d 8, 252 N.Y.S.2d 811 (1964) 14

Harris v. Balk, 198 U.S. 215 (1905) . . . 8, 15, 16, 17

Hyzen v. Hyzen, 138 N.Y.S.2d 662 (1955) 14

In re Sigmund London, Inc., 139 B.R. 765 (Bankr. E.D.N.Y. 1992) 20

K/S Norman Agathe v. Sea Trade & Construction Ltd., 767 F. Supp. 60 (S.D.N.Y. 1991) 13-14

Oppenheimer v. Dresdner Bank A. G., 50 A.D.2d 434, 377 N.Y.S.2d 625 (1975), *aff'd*, 41 N.Y.2d 949, 363 N.E.2d 358 394 N.Y.S.2d 634 (1977) 8, 12-13

Prudential-Bache Securities, Inc. v. Commissioner of Revenue, 412 Mass. 243, 588 N.E.2d 639 (1992) 7, 20-21

Quillen v. U.S., 160 B.R. 776 (W.D. Va. 1993) 20

Shaffer v. Heitner, 433 U.S. 186 (1977) 15

U.S. v. Augspurger, 452 F. Supp. 659 (W.D.N.Y. 1978), *reconsideration denied*, 477 F. Supp. 94 (W.D.N.Y. 1979) 20

U.S. v. Morton, 467 U.S. 822 (1984) 17-19

U.S. v. National Bank of Commerce, 472 U.S. 713 (1985) 20

Wechsler v. Home Savings & Loan Association, 57 Cal. App. 3d 563, 129 Cal. Rptr. 380 (Ct. App. 1976) 20

STATUTES AND OTHER AUTHORITIES

N.Y. Civ. Prac. L. & R. § 5209 (McKinney 1978) 2, 7, 10-11, 16, 19, 22

N.Y. Civ. Prac. L. & R. § 5232
(McKinney 1978) 2, 9-13, 21, 22

N.Y. Civ. Prac. L. & R. § 6204
(McKinney 1978) 2, 7, 11-14, 16

N.Y. Tax Law § 692 (McKinney 1987) 2, 11

26 U.S.C. § 6332 19

42 U.S.C. § 659(f) 18

OTHER AUTHORITIES

Fed. R. Civ. P. 12(c) 4

D. D. Siegel, Practice Commentaries to N.Y.
Civ. Prac. L. & R. § 5209
(McKinney 1978) 10-11, 16

J. M. McLaughlin, Practice Commentaries to N.Y.
Civ. Prac. L. & R. § 6204
(McKinney 1987) 12, 16

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For the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that the Court deny Petitioner's petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in this case is reported at 56 F.3d 866 and is reprinted at pages 1a-2a of appendix A to the petition. The opinion of the United States District Court for the District of Nebraska is reported at 888 F. Supp. 110 and is reprinted at pages 5a-8a of appendix B to the petition.

STATUTES INVOLVED

A copy of the principal New York statutes that are involved in this case, including relevant "Practice Commentaries" published with those statutes upon which Respondents rely, is set forth in the appendix to this Brief, as follows:

N.Y. Civ. Prac. L. & R. § 5232 (McKinney 1978)

N.Y. Civ. Prac. L. & R. § 5209 (McKinney 1978)

N.Y. Civ. Prac. L. & R. § 6204 (McKinney 1978)

N.Y. Tax Law § 692 (McKinney 1987)

STATEMENT OF THE CASE

This case arises out of Respondents' compliance with tax compliance levies issued by New York State tax authorities pursuant to New York law and served upon Respondents in New York in 1991 against assets held in securities brokerage and mutual fund accounts maintained with Respondents for Petitioner's assignee. Respondents complied with the levies by liquidating the assets of Petitioner's assignee in the accounts levied upon and paying the proceeds to the New York State tax authorities pursuant to the requirements of New York law.

On November 1, 1993, Petitioner, as assignee of Hershel Krasnow, a resident of Florida, filed suit in Nebraska state court alleging conversion by Respondents of Mr. Krasnow's assets and seeking damages for the amounts paid by Respondents to the New York State tax authorities pursuant to the tax levies. The case was removed to the United States District Court for the District of Nebraska. That court granted Respondents' motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure based on the unconditional protection against double liability that is afforded to garnishees pursuant to New York law. The court also granted

Respondents' motion for joinder of an indispensable party and added as a defendant one of Respondents' affiliates that has its principal place of business in New York. Petitioner appealed the portion of the district court's judgment that granted the motion for judgment on the pleadings. The court of appeals, in a *per curiam* opinion, affirmed the judgment.

In June 1986, Mr. Krasnow opened a brokerage account with Respondents.[1] Amended Complaint ¶ 3. From time to time thereafter, Mr. Krasnow added monies to his brokerage account and invested in various funds maintained by Respondents. *Id.* ¶ 3. Mr. Krasnow sent these funds to Respondents' Boston, Massachusetts, offices. *Id.* ¶ 3. Two of the Respondents are Massachusetts corporations with their principal offices located in Boston, Massachusetts. *Id.* ¶ 2.

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[1] The facts summarized here are drawn from the amended complaint. Petitioner's Statement of the Case includes matters not pleaded in the amended complaint, including the allegation that the levies were served to enforce liability against Mr. Krasnow and his wife for allegedly unpaid New York State taxes that had been assessed some twenty years earlier in 1968-1971. Further, Petitioner did not allege any violation of due process in her amended complaint.

In 1991, the New York State Department of Taxation and Finance served tax compliance levies on Respondents at their New York offices against Mr. Krasnow's assets. *See id.* ¶ 5. Although Mr. Krasnow objected, Respondents liquidated Mr. Krasnow's accounts and paid the proceeds of $300,743.56 to the New York State authorities "pursuant to the Tax Compliance Levies." *Id.* ¶ 4. Petitioner did not allege that Mr. Krasnow sought a court order or other judicial relief holding the tax compliance levies invalid or directing Respondents not to honor the levies. *See* Amended Complaint.

REASONS FOR DENYING THE PETITION

The decision of the court of appeals is correct, is consistent with prior decisions of this Court, does not raise any conflicts among the federal courts of appeals and is consistent with the decisions of the New York Court of Appeals in ruling upon New York state law issues. Further review by the Court is therefore unwarranted.

I. THE COURT OF APPEALS DECISION IS CONSISTENT WITH THE PRIOR DECISIONS OF THIS COURT AND OTHER COURTS

No conflict exists that New York's "levy discharge" statutes unconditionally relieve Respondents of the double liability that Petitioner unfairly seeks to impose. By

honoring the tax compliance levies on Mr. Krasnow's garnished accounts, Respondents paid the proceeds from those accounts towards the satisfaction of tax liability claimed by New York State—thereby making this payment virtually the same as a direct payment to Mr. Krasnow—and yet Petitioner contends that Respondents also must pay this same amount to her. Codifying longstanding common law in this country that no debt should have to be paid twice, New York's levy discharge statutes, N.Y. Civ. Prac. L. & R. §§ 5209 & 6204 (McKinney 1978), Resp. App. B & C, *infra*, 3a-7a, provide the same unconditional protection for garnishees that is afforded by various federal levy discharge statutes and the levy discharge statutes of an overwhelming number of other states.

Petitioner relies upon a decision of the Massachusetts Supreme Court, *Prudential-Bache Securities, Inc. v. Commissioner of Revenue*, 588 N.E.2d 639 (Mass. 1972), for the proposition that the assets in Mr. Krasnow's accounts with Respondents had a "situs" outside New York and were not subject to the tax levies, thereby making the tax compliance levies improperly paid. However, the fictional "situs" of each of Mr. Krasnow's intangible

accounts maintained by Respondents, whether in New York, Massachusetts or other states, is simply not relevant to any issue of Respondents' unconditional discharge as a matter of law from liability to Petitioner as a result of having honored the tax compliance levies. The proper recourse for Mr. Krasnow or his assignee is solely against the levying party.

A. New York Law Governs The Validity And Effect of the Tax Compliance Levies

This Court and the New York state courts have held that "[a]ttachment is the creature of the local law." *Harris v. Balk*, 198 U.S. 215, 216 (1905), *reversed on other grounds*, *Shaffer v. Heitner*, 433 U. S. 186 (1977); *Oppenheimer v. Dresdner Bank A. G.*, 50 A.D.2d 434, 377 N.Y.S.2d 625, 631 (1975), *aff'd*, 41 N.Y.2d 949, 363 N.E.2d 358, 394 N.Y.S.2d 634 (1977)("[t]he validity and effect of an order of attachment and collection is determined under the law of the forum in which it is issued").

Petitioner's express and implied admissions in her amended complaint leave no doubt that the "local law" that governs here is that of New York. Petitioner has admitted:

1. That the New York State Department of Taxation and Finance had issued, or had requested the issuance of, these tax compliance levies;

2. That these levies were issued under the authority of the law of the State of New York;

3. That Respondents were served in the State of New York with these levies;

4. That these levies represented an effort by the New York State Department of Taxation and Finance to obtain satisfaction of New York State tax obligations that the State of New York contended Mr. Krasnow owed and had not paid; and

5. That, pursuant to the levies, Respondents liquidated Mr. Krasnow's accounts and delivered the proceeds to the New York State Department of Taxation and Finance.

Amended complaint. *See also* Respondents' answer ¶¶ 4, 5, 9, 11 & 12.

The facts that certain Respondents were Massachusetts citizens and that Mr. Krasnow sent deposits to his accounts at Respondents' Massachusetts offices does not alter the applicability of New York levy law.

B. New York's Levy Discharge Statutes Insulates Respondents As A Matter Of Law Against Liability For Having Honored The Levies

The tax compliance levies were issued under Section 5232(a) of New York's Civil Practice Law and Rules. N.Y. Civ. Prac. L. & R. § 5232 (McKinney 1978), Resp. App. A, *infra*, 1a-2a. Section 5232(a) broadly authorizes a levy upon "any interest" of a judgment debtor in personal property that is not capable of delivery or upon any debts owed to the judgment debtor. Further, Section 5232(a) commands that a garnishee served with a levy must honor the directives of the levy by transferring the property interests and debts levied upon. *Id.*

The chapter that contains Section 5232(a) also includes New York's "levy discharge" statute that was the basis for the decisions of the courts below. N.Y. Civ. Prac. L. & R. § 5209, Resp. App. B, *infra*, 3a. Section 5209 provides:

> *A person who, pursuant to an execution or order, pays or delivers, to the judgment creditor* or a sheriff or receiver, money or other personal property in which a judgment debtor has or will have an interest, or so pays a debt he owes the judgment debtor, *is discharged from his obligation to the judgment debtor to the extent of the payment or delivery.*

Id. (emphasis added).

Professor David D. Siegel, in his authoritative "Practice Commentaries" to Section 5209, explains the "complete defense" that Section 5209 provides for garnishees against a claim by the judgment debtor whose assets were garnished:

> A garnishee under the CPLR [the New York Civil Practice Law and Rules] is any person who has possession of property belonging to the judgment debtor or who owes a debt to the judgment debtor. CPLR 105. Such a person is much involved in the [money judgment] enforcement procedures and through a number of devices can be required to pay over to the judgment creditor, or to the sheriff or a receiver in behalf of the judgment creditor, the property belonging to or the debt owed to the judgment debtor. *CPLR 5209 is the garnishee's assurance that when he so delivers the property or pays the debt, the judgment debtor cannot afterwards make claim against the garnishee for it. Should the judgment debtor bring suit against the garnishee for the property or debt, for example, the garnishee can plead as a complete defense the delivery or payment to the judgment debtor's judgment creditor.*

D. D. Siegel, Practice Commentaries to N.Y. Civ. Prac. L. & R. § 5209 (McKinney 1978), Resp. App. B, *infra*, 3a-6a (emphasis added).[2]

New York's levy statutes also include another levy discharge statute, Section 6204. N.Y. Civ. Prac. L. & R. § 6204 (McKinney 1978), Resp. App. C, *infra*, 7a. Section 6204 provides the identical protection from liability for a garnishee who has honored a pre-judgment attachment. *Id.*; J. M. McLaughlin, Practice Commentaries to N.Y. Civ. Prac. L. & R. § 6204 (McKinney 1978), Resp. App. C, *infra*, 7a.

New York courts have consistently upheld the protection for garnishees that Sections 5209 and 6204 afford against

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[2] Petitioner's amended complaint did not state whether the tax compliance levies were issued to satisfy a judgment or were issued as a pre-judgment attachment. Judgment on the pleadings could have been granted under either or both Section 5209 or 6204. Respondents' answer ¶¶ 11-12 specifically averred that the tax compliance levies were being issued to satisfy judgments against the Krasnows. *See also* N.Y. Tax Law § 692 (McKinney 1987), Resp. App. D, *infra*, 8a-10a ("When a warrant has been filed with the county clerk the tax commission shall, in the right of the people of the state of New York, be deemed to have obtained judgment against the taxpayer for the tax or other amounts.)

liability to a debtor in connection with a pre- or post-judgment levy. In *Oppenheimer v. Dresdner Bank A.G.*, 50 A.D.2d 434, 377 N.Y.S.2d 625, 631-633 (1975), *aff'd*, 41 N.Y.2d 949, 363 N.E.2d 358, 394 N.Y.S.2d 634 (1977), the court rejected as "strikingly unfair" the position of a plaintiff-assignee who asserted that he should be entitled to recover the balance due from a bank on a promissory note that was payable to plaintiff's assignor, when the bank had previously honored an order of attachment against the debt. Granting the bank's motion for summary judgment, the court held that the bank was discharged of any liability to the plaintiff under Section 5209 as a result of honoring the attachment. The court explained as follows:

> The purpose of this provision [Section 5209] is to protect a garnishee who pays a debt or delivers property pursuant to an execution or court order against a subsequent claim by the judgment debtor for the same debt or property (*Harris v. Balk*, . . . [198 U.S. 215 (1905)]. CPLR 6204, which is virtually identical to CPLR 5209, gives a garnishee who complies with an order of attachment the same protection . . . and the discharge of the garnishee's obligation to the judgment debtor must be recognized by the courts of sister states (*Harris v. Balk, supra*).
>
> . . .

> The policy enunciated by the [United States] Supreme Court in *Harris* and reflected in CPLR 5209 and 6204 is that "it ought to be and it is the object of courts to prevent the payment of any debt twice over" (*Harris v. Balk*, 198 U.S. 215, 226 . . .).

Id. (parentheticals in original).[3]

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[3] Other New York state and federal cases that have been decided under New York's levy discharge statutes are in accord. *See K/S Norman Agathe v. Sea Trade & Construction Ltd.*, 767 F. Supp. 60, 62-63 (S.D.N.Y. 1991) ("The actions taken by BNY [garnishee] pursuant to the writs of attachment issued by this Court were consonant with its duties pursuant to the instructions of the writ of attachment. . . . Consequently, BNY should be protected by the Court from whom those writs issued. . . . [As] authorized by C.P.L.R. § 6204, . . . the Court, for purposes of these actions, joins BNY, the garnishee, as a party to these actions so that any settlement of the claims herein to the funds sequestered by the writs of attachment will provide for appropriate indemnification or releases of the garnishee."); *Brezenoff v. Franklin Savings Bank*, 108 Misc. 2d 626, 438 N.Y.S.2d 171, 172 (Civ. Ct. 1981) (when the New York Department of Social Services served a bank with a levy on certain customers' accounts to recover welfare overpayments, the bank refused to honor the levy without a passbook unless the Department provided a surety bond or an agreement indemnifying the bank for honoring the levy; the court ordered the bank to comply with the levy, holding that the "defendant [bank] is adequately protected by Section 6204 of the CPLR . . .

(continued)

Like New York, other states and Congress have enacted similar levy discharge statutes based on common law principles designed to protect garnishees. As early as 1905, this Court, in *Harris v. Balk*, 198 U.S. 215 (1905), endorsed this now-codified common law principle by relieving a garnishee of alleged double liability for having honored a levy.

In addition to the fact that Petitioner failed to allege any constitutional due process violation in her amended complaint, Petitioner misses the mark in arguing that this

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(footnote 3, continued)
[and] defendant will be discharged from liability to the . . . [bank customers] to the extent of their funds paid to the Sheriff"); *Dumpson v. Empire City Savings Bank*, 44 Misc. 2d 8, 252 N.Y.S.2d 811, 813 (1964) (bank that honored a levy is discharged of all liability to the debtor under Section 6204); *Hyzen v. Hyzen*, 138 N.Y.S.2d 662, 665 (1955) (insurance company sought to avoid paying a judgment creditor the judgment debtor's cash value from an insurance policy because the insurer claimed this would "expose . . . it to double liability"; the court ordered the payment and explained that "[t]he claim of possible double liability is illusory since the judgment debtor, having been duly served with notice of this application, is bound by any order entered herein, and pursuant to . . . section 794 [predecessor statute to N.Y. Civ. Prac. L. & R. Section 5209], any payment made in accordance therewith operates to discharge the insurance company of any indebtedness due him.").

Court's holding in *Shaffer v. Heitner*, 433 U. S. 186 (1977), has any applicability to this case or to the portion of the *Harris v. Balk* decision that is relevant here. *Shaffer* did not overrule or otherwise affect the *Harris v. Balk* holding that garnishees who honor a levy are not liable twice for the same debt. *Shaffer* involved a pre-judgment attachment of a debtor's property in an effort to use that attachment as a basis for *quasi in rem* jurisdiction over the debtor, which this Court held would be unconstitutional unless the debtor had sufficient minimum contacts with that state to satisfy the standards for personal jurisdiction. *Shaffer* overruled *Harris v. Balk* solely to the extent of the circumstances when a pre-judgment attachment can create *quasi in rem* jurisdiction.[4]

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[4] Professor Siegel also has opined that *Harris v. Balk* still represents good law subsequent to the *Shaffer* decision in holding that garnishees who honor a levy are not liable twice for the same debt:

> The foregoing [discussion of the impact of *Shaffer v. Heitner* on *Harris v. Balk*] is not really relevant to [N.Y.] CPLR 5209, which is concerned only with post-judgment procedures to enforce an already rendered and valid judgment, because Shaffer poses no objections in that situation. . . . [T]he part

(continued)

No issue exists in this case relating to *quasi in rem* jurisdiction, nor did Petitioner allege in her Amended Complaint that *quasi in rem* jurisdiction was at stake. The clear import of the amended complaint is that the New York State Department of Taxation and Finance levied upon Mr. Krasnow's accounts not as a purported means of obtaining personal jurisdiction over Mr. Krasnow, but as a means to satisfy a debt that Mr. Krasnow owed.

(footnote 4, continued)
of the Harris case which exonerates the garnishee upon payment to the sheriff, to whatever extent the holding is in jeopardy as applied to pre-judgment attachment, is still good law as applied to post-judgment proceedings. If the attachment is being used for its security rather than for its jurisdictional purpose, the Shaffer impact should not be felt at all. It was the jurisdictional use of the property to which Shaffer objected.

N.Y. Civ. Prac. L. & R. § 5209, D. D. Siegel, Practice Commentaries (McKinney 1978), Resp. App. B, *infra*, 3a-6a.

Shaffer likewise is not relevant to New York's Section 6204 for pre-judgment attachments when such attachments are not made to obtain *quasi-in-rem* jurisdiction over the debtor. *Cf.* N.Y. Civ. Prac. L. & R. § 6204, J. M. McLaughlin, Practice Commentaries (McKinney 1978), Resp. App. C, *infra*, 7a.

Respondents' Answer likewise averred that the tax compliance levies identified Mr. Krasnow's debt as a post-judgment debt.

More recently, this Court took the opportunity to reiterate the continued viability of protection for garnishees that exists under the common law recognized in *Harris v. Balk*, as well as under the levy discharge statutes of an overwhelming number of jurisdictions, including New York. In *U.S. v. Morton*, 467 U.S. 822, 827-36 (1984), the Court rejected an Air Force colonel's collateral attack on a garnishment order against his wages and held that the federal government as garnishee in Alaska was discharged under a federal levy discharge statute from all liability to the colonel for having honored an Alabama state court garnishment order to the colonel to pay alimony and child support.[5] The garnishment order had been served on the

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[5] The federal levy discharge statute, 42 U.S.C. § 659(f), that was involved in *U.S. v. Morton*, 467 U.S. at 825, provided "[n]either the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section."

Air Force Finance Office in Alaska, where the colonel/debtor was stationed. *Id.* at 824. After the garnishment order had been served but before it had been honored, the colonel/debtor had protested to the Air Force Finance Office that the garnishment order was void because the Alabama court lacked personal jurisdiction over him. *Id.* at 824. Significantly, this Court in *Morton* expressly assumed without deciding that the garnishment order was void for lack of personal jurisdiction for the purpose of determining whether the garnishee was shielded from liability to the colonel/debtor for having honored the attachment. *Id.* at 824-36. The Court also cited in its opinion to the levy discharge statutes of twenty-nine states that have codified the common law protection for garnishees who have honored a levy, including New York's Section 5209. *Id.* at 832 & 832 nn.14-15.

Similarly, courts agree that an Internal Revenue Service tax levy discharge statute, 26 U.S.C. § 6332(e), which is nearly identical to New York's levy discharge statutes, immunizes a garnishee who has honored a federal tax levy—including even an invalid or improperly issued levy—against liability to the delinquent taxpayer whose

assets have been garnished.[6] *See, e.g., Commonwealth of Kentucky v. Laurel County*, 805 F.2d 628, 631-36 (6th Cir. 1986), *cert. denied*, 484 U.S. 817 (1987) (custodians of property who honor IRS tax levies have no further liability, "even where the payment may have been wrongful . . ."); *DiEdwardo v. First National Bank of Bath*, 442 F. Supp. 499, 499-500 (E.D. Pa. 1977); *Wechsler v. Home Savings & Loan Association*, 57 Cal. App. 3d 563, 129 Cal. Rptr. 380, 381-83 (Ct. App. 1976); *Determan v. Jenkins*, 111 F. Supp. 604, 605 (N.D. Ga. 1953); *Bolling v. Samples*, 117 Ga. App. 38, 159 S.E.2d 727, 729 (Ga. App. 1967); *see*

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[6] This IRS levy discharge statute, Section 6332(e), which was previously codified at Section 6332(d), states:

> Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made who, upon demand by the Secretary, surrenders such property or rights to property (or discharges such obligation) to the Secretary (or who pays a liability under subsection (d)(1) [pursuant to an IRS levy]) *shall be discharged from any obligation or liability to the delinquent taxpayer* and any other person with respect to such property or rights to property arising from such surrender or payment.

26 U.S.C. § 6332(e) (emphasis added) (previously codified at 26 U.S.C. § 6332(d)).

also U.S. v. Augspurger, 452 F. Supp. 659 (W.D.N.Y. 1978), *reconsideration denied*, 477 F. Supp. 94, 96-97 (W.D.N.Y. 1979) (broker-dealer did not have "legitimate concern with the legality of the levy," as it "was not . . . [its customer's] attorney."[7]

In a case decided after Respondents had honored the tax compliance levies against Mr. Krasnow's assets, *Prudential-Bache Securities, Inc. v. Commissioner of Revenue*, 412 Mass. 243, 588 N.E.2d 639 (1992), the Massachusetts Supreme Court did not reach the levy discharge issue that the courts below decided because the garnishee in the *Prudential* case chose to file an interpleader action instead of honoring the levy. However, *nothing* in the governing law—or the *Prudential* case—requires a levied party to opt for that expensive and time-consuming route after being served with a levy in order to avoid liability to the debtor.

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[7] A number of other cases also have construed the IRS levy discharge statute and upheld its protection for garnishees. *See U.S. v. National Bank of Commerce*, 472 U.S. 713, 720-31 (1985); *Burroughs v. Wallingford*, 780 F.2d 502, 503 (5th Cir. 1986); *Quillen v. U.S.*, 160 B.R. 776, 779 (W.D. Va. 1993); *In re Sigmund London, Inc.*, 139 B.R. 765, 768-72 (Bankr. E.D.N.Y. 1992).

The *Prudential* decision also has no applicability to this case for another reason. New York law, not Massachusetts law, governs the validity and effect of the tax compliance levies that were served in New York against Mr. Krasnow's accounts maintained by Respondents. Petitioner's arguments ignore the fact that New York statutes allow a sheriff to levy upon "any interest" in a debtor's personal property. N.Y. Civ. Prac. L. & R. § 5232, Resp. App. A, *infra*, 1a-2a. New York law likewise broadly extends the protection of its "levy discharge" statutes in the same manner. Significantly, New York's "levy discharge" statutes do not contain any limiting language that they apply to personal property "located only within the State of New York." *See* N.Y. Civ. Prac. L. & R. §§ 5209 & 6204, Resp. App. B & C, *infra*, 3a-7a.

New York's levy discharge statutes, like the common law and other similar federal and state statutes, are intended to encourage levied parties to comply quickly with a levy without worrying about potential liability to the debtor and without being compelled to investigate or litigate the legalities of the levy—including the often complex legal question of where a debtor's intangible personal property rights are deemed to be located under the

sometimes conflicting laws of various states. Even if it is assumed *arguendo* that Mr. Krasnow's accounts maintained by Respondents were not New York situs property subject to levy in New York, Petitioner cannot recover any damages in light of the unconditional protection that New York's levy discharge statutes provide to garnishees who have honored levies.

CONCLUSION

For the reasons discussed above, Respondents respectfully submits that this Court should deny Petitioner's petition for writ of certiorari.

Dated: September 25, 1995.

Respectfully submitted,

FIDELITY BROKERAGE SERVICES, INC., FIDELITY SERVICE CORPORATION; and NATIONAL FINANCIAL SERVICES CORPORATION,

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APPENDIX

Appendix A—N.Y. Civ. Prac. L. & R. § 5209 (McKinney 1978)

Appendix B—N.Y. Civ. Prac. L. & R. § 5232 (McKinney 1978)

Appendix D—N.Y. Civ. Prac. L. & R. § 6204 (McKinney 1978)

Appendix E—N. Y. Tax Law § 692 (McKinney 1987)

EDITOR'S NOTE

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APPENDIX A

N.Y. Civ. Prac. L. & R. § 5232 (McKinney 1978)

§ 5232. Levy upon personal property

(a) Levy by service of execution. The sheriff shall levy upon any interest of the judgment debtor in personal property not capable of delivery, or upon any debt owed to the judgment debtor, by serving a copy of the execution upon the garnishee, in the same manner as a summons, except that such service shall not be made by delivery to a person authorized to receive service of summons solely by a designation filed pursuant to a provision of law other than rule 318. In the event the garnishee is the state of New York, such levy shall be made in the same manner as an income execution pursuant to section 5231 of the civil practice law and rules. A levy by service of the execution is effective only if, at the time of service, the person served owes a debt to the judgment debtor or he is in the possession or custody of property not capable of delivery in which he knows or has reason to believe the judgment debtor has an interest, or if the judgment creditor has stated in a notice which shall be served with the execution that a specified debt is owed by the person served to the judgment debtor or that the judgment debtor has an interest in specified property not capable of delivery in the possession or custody of the person served. All property not capable of delivery in which the judgment debtor is known or believed to have an interest then in or thereafter coming into the possession or custody of such a person, including any specified in the notice, and all debts of such a person, including any specified in the notice, then due or thereafter coming due to the judgment debtor, shall be subject to the levy. The person served with the execution shall forthwith transfer all such property, and pay all such debts upon maturity, to the sheriff and execute any document necessary to effect the transfer or payment. After such transfer or payment, property coming into the possession or custody of the garnishee, or debt incurred by him, shall

not be subject to the levy. Until such transfer or payment is made, or until the expiration of ninety days after the service of the execution upon him, or of such further time as is provided by any order of the court served upon him, whichever event first occurs, the garnishee is forbidden to make or suffer any sale, assignment or transfer of, or any interference with, any such property, or pay over or otherwise dispose of any such debt, to any person other than the sheriff, except upon direction of the sheriff or pursuant to an order of the court. At the expiration of ninety days after a levy is made by service of the execution, or of such further time as the court, upon motion of the judgment creditor has provided, the levy shall be void except as to property or debts which have been transferred or paid to the sheriff or as to which a proceeding under sections 5225 or 5227 has been brought. A judgment creditor who has specified personal property or debt to be levied upon in a notice served with an execution shall be liable to the owner of the property or the person to whom the debt is owed, if other than the judgment debtor, for any damages sustained by reason of the levy.

(b) **Levy by seizure.** The sheriff shall levy upon any interest of the judgment debtor in personal property capable of delivery by taking the property into his custody without interfering with the lawful possession of pledgees and lessees. The sheriff shall forthwith serve a copy of the execution in the manner prescribed by subdivision (a) upon the person from whose possession or custody the property was taken.

L.1962, c. 308, § 5231; renumbered 5232, L.1962, c. 315, § 5; amended L.1963, c. 532, § 34; L.1968, c. 743, § 1.

APPENDIX B

N.Y. Civ. Prac. L. & R. § 5209 (McKinney 1978)

§ 5209. Discharge of garnishee's obligation

A person who, pursuant to an execution or order, pays or delivers, to the judgment creditor or a sheriff or receiver, money or other personal property in which a judgment debtor has or will have an interest, or so pays a debt he owes the judgment debtor, is discharged from his obligation to the judgment debtor to the extent of the payment or delivery.

L.1962, c. 308.

Historical Note

Derivation. C.P.A.1920, § 684 amended L.1926, c. 618: L.1931, c. 718: L.1934, c. 360: L.1935, c. 192: L.1936, c. 304: L.1939, cc. 321, 356, 651: L.1941, c. 865: L.1950, c. 823: L.1954, c. 386: L.1957, c. 818: § 687-a added L.1952, c. 835, amended L.1955, c. 216: § 794 added L.1935, c. 630, amended L.1936, c. 607: L.1938, c. 605: L.1941, c. 694.

C.C.P.1876, § 1391 amended L.1879, c. 542: L.1901, c. 116: L.1903, c. 461: L.1905, c. 175: L.1908, c. 148: L.1911, cc. 489, 532: L.1914, c. 352: L.1919, c. 278.

Practice Commentaries

by David D. Siegel

C5209:1. Protecting the Garnishee.

A garnishee under the CPLR is any person who has possession of property belonging to the judgment debtor or who owes a debt to the judgment debtor. CPLR 105. Such a person is much involved in the enforcement procedures and through a number of devices can be required to pay over to the judgment creditor, or to the sheriff or a receiver in behalf of the judgment creditor, the property belonging to or the debt owed to the judgment debtor. CPLR 5209 is the garnishee's assurance that when he so delivers the property or pays the debt, the judgment debtor cannot afterwards make claim against the garnishee for it. Should the judgment debtor bring suit against the garnishee for the property or debt, for example, the garnishee can plead as a complete de-

Appendix B

fense the delivery or payment to the judgment debtor's judgment creditor.

At the post-judgment enforcement stage, this rule seems to have clear sailing. It used to be equally clear in the case of a pre-judgment attachment. Harris v. Balk, 198 U.S. 215, 25 S.Ct. 625, held in 1905 that a garnishee is equally well protected when he pays on an attachment. P had sued D in Maryland, which lacked jurisdiction of D. G, the garnishee who concededly owed D a debt, was passing through Maryland and P had an attachment served on G, seizing the debt as a quasi in rem jurisdictional basis for the claim P was asserting against D. G paid the debt to the sheriff, to the credit of P's action, and when D later sued G on that debt in another state G's prior payment to the Maryland sheriff was held to be a complete defense. Insofar as that debt was being used as a quasi in rem basis for jurisdiction in Harris, the United States Supreme Court overruled it in Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, in 1977. Until the fallout from the Shaffer case settles, a garnishee in a situation in which the debt he owes the debtor is not being sought to satisfy a valid judgment already rendered, but rather as a basis upon which to render a judgment without personal jurisdiction of the debtor, should be cautious. Presumably, the attempted application of such a debt in violation of the Shaffer case would have to be objected to by the debtor, perhaps by a motion to dismiss after being notified of the action, but if the garnishee is not clear on this, and has any reason to suspect a Shaffer violation, perhaps the garnishee should just hold back the payment until a definitive judicial determination is made of his obligations in the particular case.

The foregoing is not really relevant to CPLR 5209, which is concerned only with post-judgment procedures to enforce an already rendered and valid judgment, because Shaffer poses no objections in that situation. But it is relevant under CPLR 6204, which purports to perform a like mission upon attachment. The point to stress here is that the part of the Harris case which exonerates the garnishee upon payment to the sheriff, to whatever extent the holding is in jeopardy as

Appendix B

applied to pre-judgment attachment, is still good law as applied to post-judgment proceedings. Over the years Harris has been cited with equal force in both situations. If the attachment is being used for its security rather than for its jurisdictional purpose, the Shaffer impact should not be felt at all. It was the jurisdictional use of the property to which Shaffer objected.

Another situation in which the garnishee must be wary is where some third person other than the judgment debtor may be claiming the money or property at issue. The garnishee can safely pay the money or property over to the judgment creditor, or to a sheriff or receiver carrying out an enforcement procedure on the judgment creditor's judgment, only when the garnishee concedes that the property belongs to or the debt is owed to the judgment debtor. If X, a third person, claims the property, or insists that the debt is owed to him rather than to the judgment debtor, and the garnishee is not able to refute this to his own complete satisfaction, he cannot take the chance of delivering the property or paying the debt to or in behalf of the judgment creditor. Should the garnishee so deliver or pay it, and later be sued by X, X would be entitled to prove that the property was his or the debt owed to him, and, should X prevail, the garnishee would have to deliver or pay again, sustaining a double loss.

The remedy of the garnishee confronted with this prospect is not to deliver the property or pay the debt under the enforcement procedure, but to advise the judgment creditor or enforcement official of X's conflicting claim. The judgment creditor can then commence a special proceeding against the garnishee, and from his position as respondent in that proceeding the garnishee can interplead X, see CPLR 5225(b), 5227, 1006, obtaining leave of court for the interpleader if necessary. CPLR 401. Perhaps the judgment creditor will join X as a respondent in the proceeding along with the garnishee. This will obviate an interpleader step by the garnishee, all of the disputing parties being present in the special proceeding and thus bound by the judgment. The garnishee should also see to it—again, by interpleading if need be in the

Appendix B

special proceeding—that the judgment debtor has been made a party. Otherwise, if the debt is adjudicated in the special proceeding to belong to X rather than to the judgment debtor, the garnishee will not be insulated from a later suit by the judgment debtor to collect it. Interpleader should not be necessary in that situation, however, because CPLR 5225(b) and 5227 expressly require that the judgment debtor be made a party to the special proceeding when the judgment creditor brings it.

APPENDIX C

N.Y. Civ. Prac. L. & R. § 6204 (McKinney 1978)

§ 6204. Discharge of garnishee's obligation

A person who, pursuant to an order of attachment, pays or delivers to the sheriff money or other personal property in which a defendant has or will have an interest, or so pays a debt he owes the defendant, is discharged from his obligation to the defendant to the extent of the payment or delivery.

L.1962, c. 308.

Historical Note

Derivation. New.

Practice Commentaries

By Joseph M. McLaughlin

C6204:1. In General.

C6204:1. In General.

There was no counterpart to this section in the Civil Practice Act, although its essence had appeared in the provisions affecting enforcement of judgments. See CPA §§ 794(3), 684(2) and 687–a(2). See also CPLR 5209. A defendant is entitled to notice of the action being prosecuted against him; but it is not clear in the CPLR that the defendant is entitled to notice of orders of attachment or of actual levies upon property in the hands of garnishees. Under this section, then, the garnishee would be discharged from liability to the defendant without any requirement that the garnishee notify the defendant of the levy. Whether this will prove constitutional remains to be seen. Cf. Harris v. Balk, 1905, 198 U.S. 215, 25 S.Ct. 625.

APPENDIX D

N. Y. Tax Law § 692 (McKinney 1987)

§ 692. Collection, levy and liens

(a) Collection procedures.—The taxes imposed by this article shall be collected by the tax commission, and it may establish the mode or time for the collection of any amount due it under this article if not otherwise specified. The tax commission shall, upon request, give a receipt for any sum collected under this article. The tax commission may authorize banks or trust companies which are depositaries or financial agents of the state to receive and give a receipt for any tax imposed under this article in such manner, at such times, and under such conditions as the tax commission may prescribe; and the tax commission shall prescribe the manner, times and conditions under which the receipt of such tax by such banks and trust companies is to be treated as payment of such tax to the tax commission.

(b) Notice and demand for tax.—The tax commission shall as soon as practicable give notice to each person liable for any amount of tax, addition to tax, penalty or interest, which has been assessed but remains unpaid, stating the amount and demanding payment thereof. Such notice shall be left at the dwelling or usual place of business of such person or shall be sent by mail to such person's last known address. Except where the tax commission determines that collection would be jeopardized by delay, if any tax is assessed prior to the last date (including any date fixed by extension) prescribed for payment of such tax, payment of such tax shall not be demanded until after such date.

(c) Issuance of warrant after notice and demand.—If any person liable under this article for the payment of any tax, addition to tax, penalty or interest neglects or refuses to pay the same within ten days after notice and demand therefor is given to such person under subsection (b), the tax commission may within six years after the date of such assessment issue a warrant under its official seal directed to the sheriff of any county of the state, or to any officer or employee of the department of taxation and finance, commanding him to levy upon and sell such person's real and personal property for the payment of the amount assessed, with the cost of executing

the warrant, and to return such warrant to the tax commission and pay to it the money collected by virtue thereof within sixty days after the receipt of the warrant. If the tax commission finds that the collection of the tax or other amount is in jeopardy, notice and demand for immediate payment of such tax may be made by the tax commission and upon failure or refusal to pay such tax or other amount the tax commission may issue a warrant without regard to the ten-day period provided in this subsection.

(d) Copy of warrant to be filed and lien to be created.—Any sheriff or officer or employee who receives a warrant under subsection (c) shall within five days thereafter file a copy with the clerk of the appropriate county. The clerk shall thereupon enter in the judgment docket, in the column for judgment debtors, the name of the taxpayer mentioned in the warrant, and in appropriate columns the tax or other amounts for which the warrant is issued and the date when such copy is filed; and such amount shall thereupon be a lien upon the title to and interest in real, personal and other property of the taxpayer. Such lien shall not apply to personal property unless such warrant is filed in the department of state.

(e) Judgment.—When a warrant has been filed with the county clerk the tax commission shall, in the right of the people of the state of New York, be deemed to have obtained judgment against the taxpayer for the tax or other amounts.

(f) Execution.—The sheriff or officer or employee shall thereupon proceed upon the warrant in all respects, with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and a sheriff shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner. An officer or employee of the department of taxation and finance may proceed in any county or counties of this state and shall have all the powers of execution conferred by law upon sheriffs, but shall be entitled to no fee or compensation in excess of actual expenses paid in connection with the execution of the warrant.

(g) Taxpayer not a resident.—Where a notice and demand under subsection (b) shall have been given to a taxpayer who is not then a resident, and it appears to the tax commission that it is not practicable to find in this state property of the taxpayer sufficient to pay the entire balance of tax or other amount owing by such taxpayer who

is not then a resident, the tax commission may, in accordance with subsection (c), issue a warrant directed to an officer or employee of the department of taxation and finance, a copy of which warrant shall be mailed by certified or registered mail to the taxpayer at his last known address, subject to the rules for mailing provided in subsection (a) of section six hundred eighty-one. Such warrant shall command the officer or employee to proceed in Albany county, and he shall, within five days after receipt of the warrant, file the warrant and obtain a judgment in accordance with this section. Thereupon the tax commission may authorize the institution of any action or proceeding to collect or enforce the judgment in any place and by any procedure that a civil judgment of the supreme court of the state of New York could be collected or enforced. The tax commission may also, in its discretion, designate agents or retain counsel for the purpose of collecting, outside the state of New York, any unpaid taxes, additions to tax, penalties or interest which have been assessed under this article against taxpayers who are not residents of this state, may fix the compensation of such agents and counsel to be paid out of money appropriated or otherwise lawfully available for payment thereof, and may require of them bonds or other security for the faithful performance of their duties, in such form and in such amount as the tax commission shall deem proper and sufficient.

(h) Action by state for recovery of taxes.—Action may be brought by the attorney general at the instance of the tax commission in the name of the state to recover the amount of any unpaid taxes, additions to tax, penalties or interest which have been assessed under this article within six years prior to the date the action is commenced.

(i) Release of lien.—The tax commission, if it finds that the interests of the state will not thereby be jeopardized, and upon such conditions as it may require, may release any property from the lien of any warrant for unpaid taxes, additions to tax, penalties and interest filed pursuant to this section, and such release may be recorded in the office of any recording officer in which such warrant has been filed.

(Added L.1962, c. 1011, § 1; amended L.1963, c. 855, § 1; L.1985, c. 65, § 66.)